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IN THE

Supreme Court of the United States

October Term, 1958

No. 495

SOMERVILLE MILLING COMPANY,
MACNEIL BROS. COMPANY,
ANGUS M. MACNEIL, JOSEPH A. MACNEIL,
UNION HEIGHTS OIL COMPANY, INC.,
JOHN E. DORIS, JAMES T. MACNEIL,
DONALD M. MACNEIL

Defendant Appellants

v.

WORCESTER NORTH SAVINGS INSTITUTION

Plaintiff Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S MOTION TO DISMISS

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Defendant Appellants

v.

WORCESTER NORTH SAVINGS INSTITUTION

Plaintiff Appellee

APPELLEE'S MOTION TO DISMISS

The Worcester North Savings Institution, Appellee in the above-entitled action, moves to dismiss the Appellants' appeal on the grounds that:

(a) The appeal is not taken in conformity with statute or rules of the Supreme Court of the United States.

(b) This appeal does not present a substantial federal question.

(c) The Federal question sought to be reviewed was not timely or properly raised.

(d) The Federal question sought to be reviewed was not expressly passed on.

Preliminary Statement

This action originated as a Bill in Equity to quiet title to real estate located in Brookline, N. H., which was brought by the plaintiff-appellee against the defendant-appellants in the Hillsborough County Superior Court of the State of New Hampshire. The appellee obtained title to the real estate by a foreclosure sale under its power of sale mortgage executed by Somerville Milling Company by its President, Angus MacNeil. Trial by court with the decree that the appellee's title to real estate was free, clear and discharged of all claims of the appellants, as more particularly shown by the record.

Transferred to the Supreme Court of the State of New Hampshire on the appellants' exceptions which were overruled by the Supreme Court on May 29, 1958. Reported A 2d. 101 N. H. 307.

Notice of appeal to the Supreme Court of the United States was filed by the appellants with the Clerk of the Supreme Court of the State of New Hampshire on September 2, 1958.

Statement of Facts

On November 1, 1950, Somerville Milling Co., by Angus M. MacNeil, President, borrowed the sum of $30,000 from Worcester North Savings Institution with interest at 5% per annum, payable in equal monthly installments of $325.60 each, beginning December 1, 1950, to be applied first to interest then due, and the remainder to principal, the whole sum to be due and payable in or within ten years at the office of the institution, said note being endorsed by Angus M. MacNeil and Joseph A. MacNeil individually, waiving demand, notice and protest, said promissory note being secured by a certain power of sale mortgage on real estate owned by Somerville situate on the westerly side of Main Street and on the easterly side of Baboosic Road in Brookline, County of Hillsborough

and State of New Hampshire, by deed dated November 1, 1950, recorded in Hillsborough County Register of Deeds, November 1, 1950, at 2:08 P. M. in Book 1273, Page 385 (R. p. 17, exhibits 1 and 2).

Somerville conveyed its interest in this real estate, subject to the mortgage, to MacNeil Bros. Company by deed dated May 8, 1951, recorded Hillsborough Register of Deeds, May 8, 1951, at 1:25 P. M. Book 1288, Page 490 (R. p. 18, exhibit 3).

On December 14, 1951, MacNeil Bros. Company conveyed the premises to Union Heights Oil Company, Inc., by deed dated December 14, 1951, recorded Hillsborough County Register of Deeds on February 18, 1952, at 10 A. M. Book 1313, Page 127 (R. p. 18, exhibit 4).

Admittedly the mortgage was in default (R. p. 23, l. 17) and foreclosure proceedings were instituted by the petitioner which terminated in the sale of the property at a mortgage foreclosure sale on November 1, 1955, at which time the property was purchased by the Worcester North Savings Institution (R. p. 9).

ARGUMENT

I. The Appeal is not within the jurisdiction of this Court because it was not taken in conformity with statute or the rules of the Supreme Court of the United States.

The Jurisdictional Statement of the Appellants states in part as follows: "...the judgment of the Supreme Court of the State of New Hampshire entered June 6, 1958, decided May 29, 1958..." The date of June 6, 1958, does not appear anywhere in the records. The case was argued before the Supreme Court of the State of New Hampshire on May 6, 1958, and was decided by the filing of a written opinion with the Clerk of the Supreme Court of the State of New Hampshire on May 29, 1958.

New Hampshire RSA c. 490, s. 15 reads as follows:

> "Opinions; Notice. The justices shall file with the clerk a written opinion in every case decided by them, and the clerk shall at once notify the parties or their counsel, by mail, of the order made. No order of the court for a final disposition of a case pending therein shall be valid and binding until an opinion has been filed."

Under this statute the order of the Supreme Court became valid and binding as soon as the opinion was filed.

New Hampshire RSA c. 490, s. 16 applies only to situations in which further action is necessary in the Superior Court and has no application to the effective date of the opinion rendered by the Supreme Court. The effective date from which the appeal could be taken shall be calculated from May 29, 1958.

28 U. S. C. A. 2101 (c) reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall* be taken or applied for *within* ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." (Italics supplied)

Ninety days from, but not including, May 29, 1958, would be August 27, 1958. The notice of appeal was not filed until September 2, 1958, or more than five days after the appeal period had expired. The notice of appeal was not in conformity with 28 U. S. C. A. 2101, and Rule 16 of the Supreme Court of the United States. The appeal must be dismissed.

II. This Appeal is not within the jurisdiction of this Court because

A. It does not present a substantial federal question;

B. The Federal question sought to be reviewed was not properly raised;

C. The Federal question sought to be reviewed was not expressly passed on.

The defendant appellant seeks to raise five federal issues. These will be taken up in order.

1. *Soldiers' and Sailors' Civil Relief Act.*

In argument before the trial court, but without any supporting evidence, the attorney for the appellants said that persons having a second mortgage on the property foreclosed were in the armed forces. The alleged mortgage was not recorded and it was not produced at the time of trial. The parties, who it was argued held the second mortgage, did not appear or testify, nor was their absence explained.

An Appellate Court does not consider any issue not presented by evidence contained in the transferred record from the trial court. The court said in *White v. Central Dispensary and Emergency Hospital*, 99 F. 2d 355, 359 (1938) 69 App. D. C. 122:

> "...A court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of judicial jurisdiction; it can act only upon the facts appearing in the record before it." (Cases cited)

Furthermore, the provisions of Title 50 U. S. C. A. 532, do not apply to this situation. Paragraph (1) of this section reads as follows:

"(1) The provisions of this section shall apply only to obligations secured by mortgage, trustee, or other security in the nature of a mortgage upon real or personal property *owned* by a person in military service at the commencement of the period of military service and still so *owned* by him, which obligations originated prior to such person's period of military service." (Italics supplied)

It is perfectly obvious that second mortgagees do not *own* the premises subject to this mortgage. It was held in *Culver v. Superior Court in and for Los Angeles County*, 1954, 270 P. 2d 78, 125 C. A. 2d 76, that the beneficial owners of second mortgage, whether they were assenting creditors of mortgagor or assignees of such creditors, were not "owners" of the mortgaged property within this section, prohibiting foreclosure of mortgaged property during period of military service of owner, and could not invoke this section. In this case there is no evidence contained in the record to raise this issue and the record also discloses that no such evidence was ever presented.

The Supreme Court of the State of New Hampshire, in the next to the last paragraph of its opinion, after commenting on the absence of evidence to substantiate the claim said "Consequently there is no basis for this Court to make any determination under the statute."

2. *Denial of Full Faith and Credit to Decisions of Other States.*

The attorney for the appellants, in oral argument and by numerous motions addressed to the trial court, referred to actions pending in the courts of other states. However, no evidence was offered which properly presented this issue for consideration by the court. Arguments of counsel and pleadings do not constitute evidence.

The second section of 28 U. S. C. A. 1738 reads as follows:

> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the Clerk and seal of the Court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form."

A judicial record of one state cannot be proved or admitted in courts of another state as evidence of a fact until there has been a compliance with this section. *Wallace v. Herring*, Miss. 1949, 43 So. 2d 100 (28 U. S. C. A. 1738—Note 21). The courts of the State of New Hampshire insist that the federal requirements be complied with. *Folsum v. Blood*, 53 N. H. 434, 435.

There being no competent evidence of judicial proceedings pending in any other court, the trial court could not and did not give this issue any consideration. The Supreme Court of the State of New Hampshire, in the last paragraph of its written opinion, clearly indicates that the record of the trial court did not contain sufficient evidence of the claim to justify its consideration.

3. *Bankruptcy Act.*

It is difficult from the record to determine the provisions of the Bankruptcy Act relied upon by the appellants. Before the Supreme Court of the State of New Hampshire the appellants argued with reference to certain undesignated provisions of the Bankruptcy Act but cited in support of their argument *Meyer v. Rosen*, 181 F. 2d 715. The section interpreted by the *Rosen* case is 11 U. S. C. A. 801.

There is no evidence which properly proved before the trial court of the State of New Hampshire that a petition in bank-

ruptcy was ever filed and there is evidence that even if such a petition was filed it was not filed until after the foreclosure sale had taken place (R. p. 64-65).

Furthermore, even if it is found by this Court that a petition in bankruptcy was in fact filed, the provisions of the Bankruptcy Act upon which the appellants apparently rely in the State court do not apply to corporations. The case of *Meyer v. Rosen*, 181 F. 2d 715, cited by the appellants in the Jurisdictional Statement (Section IV) involved persons rather than corporations and is under the provision of the Bankruptcy Act concerning real property arrangements. 11 U. S. C. A. 801 and following. These provisions by their terms do not apply to corporations. 11 U. S. C. A. 806 (6) reads in part as follows: "(6) 'debtor' shall mean a person, *other than a corporation...*" Consequently, the provisions upon which the appellants rely are inapplicable.

The appellants now cite in the Jurisdictional Statement U. S. Code Title 11, c. 7, s. 110 (11 U. S. C. A. 110). This section is concerned with the vesting of title to property in the trustee. There is no evidence in the record that a trustee was ever appointed so this section has no application.

Title to real estate remains in the bankrupt until a trustee is appointed. 11 U. S. C. A. 110 (see notes 41-90, see Note 46-47). A foreclosure sale of real estate is not invalid if made in conformity with State Laws even though an involuntary petition in bankruptcy is filed between the date of publishing notice of foreclosure and the date of sale. This sale is valid even though the mortgagee purchases at the sale. 11 U. S. C. A. 110, Note 51. *Robinson v. Kay*, 7 F. 2d 576.

11 U. S. C. A. 28 does not apply for this section but its terms apply only to suits founded on a claim from which a discharge in bankruptcy would be a release. Consequently the provisions upon which the appellants rely are inapplicable.

4. *Reviewing without due process decisions ex post facto on matters adjudicated by a court of competent jurisdiction in another state.*

There is no probative evidence in the record of any adjudication by courts in another state. The attorney for the appellants, by motion and in argument, indicated that there were proceedings in other states. However, these proceedings were not proved in accordance with the second section of 28 U. S. C. A. 1738 (*supra*). Consequently, there is no probative evidence for the court to consider on this issue.

5. *The denial of the courts of New Hampshire of due process of law by adjudicating rights of persons not made parties and given notice or opportunity of being heard.*

The real estate subject to the mortgage was located in Brookline, County of Hillsborough, State of New Hampshire. A bill in equity to remove cloud from and to quiet title is local in character. In *Bancroft v. Conant*, 64 N. H. 151 the court said:

> "This is a bill in equity to remove a cloud upon the title to real estate within the jurisdiction of the court. It is in the nature of a proceeding in *rem* and local in its character, and the court has jurisdiction of the subject-matter of the controversy. Actions for the recovery of real property, or for the determination of an interest therein, are local, and conflicting titles and rights to the possession of lands must ordinarily be determined by the courts of the state wherein the lands lie; and whether the relief is sought at common law or in chancery, the rule of jurisdiction equally applies."

Notice of the foreclosure proceedings were mailed to Angus M. MacNeil, Summerville, and to MacNeil Brothers, as well as others, on August 2, 1955 (R. p. 34, l. 18). Notice was sent to Union Heights Oil Company before the foreclosure sale

(R. p. 37, l. 15). In any event, notice was sent to the Mortgagor Somerville in each instance (R. p. 33, 35, 36, 37). Under R. S. A. c. 479, s. 25 III the title owner or owners of the property are not entitled to notice of the sale provided the mortgagor receives notice. *Armille v. Lovett*, 100 N. H. 203 considered the rights of anyone interested in mortgaged property to receive notice of a power of sale foreclosure proceeding. In considering this the court said, page 205:

> "Unless the power of sale mortgage or the statute requires notice to junior lienors a power of sale foreclosure is valid with notice only to the mortgagor. This rule has been established for a long time and applies to the instant case. *Scott v. Paisley*, 271, U. S. 632; *Watkins v. Booth*, 55 Colo. 91. The rule is set forth in 4 American Law of Property, s. 16, 207, p. 507 (1952) as follows: 'When notice is of the personal variety, unless it is required by the terms of the power itself or by statute, it does not have to be given to anyone other than the mortgagor.' We conclude that the defendants as attaching creditors (*Felker v. Hazelton*, 68 N. H. 304, 305) were not required to be given the same notice as the mortgagor and that the failure to do so did not affect the validity of the foreclosure sale.
>
> "It may be true that the careful conveyancer, for the protection of the mortgagee, generally will notify junior lienors and this course of procedure has been recommended by an acknowledged authority even though not required by statute. See 1 Glen, Mortgages, s. 110. 1 p. 671 (1943): 'But the better method, I suggest, is a general requirement that the junior encumbrancer shall receive the same sort of notice that the mortgagor gets, whatever that may be.' See also, Forum on Title Examinations on 9 Proc. N. H. Bar Assn. (new series no. 2) 51-52 (1952). While it is not a statutory prerequisite to the validity of the title conveyed on foreclosure, this

recommended procedure may be additional evidence that the mortgagee has performed his duty to the mortgagor to exercise good faith and due diligence in conducting the mortgage foreclosure. *Pearson v. Gooch*, 69 N. H. 208, *Wheeler v. Slocinski*, 82 N. H. 211."

All necessary parties were either notified or they were not entitled to notification.

CONCLUSION

The appeal to this court from the order of the Supreme Court of the State of New Hampshire should be dismissed because,

(a) The appeal is not taken in conformity with statute or the rules of the Supreme Court of the United States;

(b) This appeal does not present a substantial federal question;

(c) The Federal question sought to be reviewed was not timely or properly raised;

(d) The Federal question sought to be reviewed was not expressly passed on.

Respectfully submitted,

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